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Realization of right on the reasonable terms of pre-court investigation and court consideration of cases – European standards and situation in Ukraine.

The problem of providing of right of person on the reasonable term of consideration of its cases by state organs is actual in the conditions of legal state development in Ukraine and adduction of national law system in accordance with the European standards. Today in there is no mechanisms of effective prevention of violation of right for consideration of cases in a reasonable terms, in the Ukrainian legislation that sets the problem on its development. It is necessary to explore nature of the indicated right of person, possibility of its providing, realization, renewal and indemnification for violation of this right, existence of the proper legal, organizational and financial guarantees.

A right on the reasonable terms of consideration of cases in European legal tradition belongs to both two legal branches of processual rights and of constitutional human rights. Now in the Ukrainian legislation there is no possibility of appeal to the court (even to the Supreme Court) on inactivity of concrete judge (judges) during consideration of administrative, civil, criminal, economic cases; the mechanism of indemnification of the harm, caused by violation of right on the reasonable terms is also absent, the reasonableness of term of consideration of cases even is not included to the system of the principles of national justice.

The right of person for consideration of civil or criminal case "during a reasonable term" is guaranteed at the same time by a § 1 item 6 of European Convention on human rights, ratified Ukraine in 1997. The calculations of terms in the legislation of Ukraine and in practice of the European court for human rights (ECHR) are different. In particular duration of criminal procedure in obedience to the ECHR practice settles accounts from the moment of excitation of criminal case, detention of person or its bringing in as defendant; in civil cases the duration settles accounts from the moment of presentation of point of claim in a court. The moment of reception of the final sentence or decision of court is considered as the eventual moment of consideration of any case, after consideration in an appeal instance. Such calculation, from one side, is enough just, at the same time a large part of cases in Ukraine is examined in temporal scopes to 5-7 years.

The European court marks three factors, determining a question, was there the trial carried out in a reasonable term or not, they are: complication of case, conducts of accused and efficiency of national power. The ECHR case-law shows that a reasonable term can not be set abstractly, for it this court's decision on a case Stogmyuller v. Austria from 10th of November, 1969, is characteristic. How the European court

defined in the decision on a case Vemkhoff v. Germany from 27th of June, 1968, the reasonableness of lasting term of holding under a guard the accused person must be is certain in every case separately, in obedience to all circumstances.

ECHR has a various practice of confession of those fact – were the terms of detention reasonable or not. So, the pre-court conclusion by a term of 4,5 years, looked in the case Varner v. Switzerland of 1993 was acknowledged as clever. In the same time the case Letel'e v. France of 1991, may be looked as a model, when ECHR defined that term of maintenance under guards in 2 years and 9 months exceeded reasonable, as, in obedience to circumstances of this case, maintenance of person under guards left off to be a necessity in a 1 year and 4 months after its detention. So, as experts mark, the main matters for the European court are not so much the duration of term, but reasons of maintenance of person under guards and also the circumstances, which stipulated the necessity of long terms of judicial procedure.

Even in a situation of default of actual limitation of common laws of person (freedoms of movement, of residence) ECHR acknowledges the presence of violation of right on the reasonable terms, as those persons „are in a state of uncertainty about the results of criminal process against them". At the same moment the government of Ukraine admitted that excessive duration of investigation by criminal case may inflict a moral damage to the declarant.

Thus if a declarant hides from the organs of investigation and court, violation of right on a reasonable term is not present, even if consideration of case will take a few years. In a case Meryt v. Ukraine a court specified, that a declarant is accountable for the delay during its acquaintance with materials of case, but he is not responsible for giving no complaints, even if it was an instrument in tightening of consideration by case. Long consideration of case is assumed only on cases which are difficult in factual or legal aspects. Such arguments, as a work-load of courts, lack of tools on the noticing of parties about the date of the judicial meeting or to the driving of witnesses, are put by the ECHR in guilt to exactly the state as it violates the right of person on a reasonable term. The indemnification of sum for the compensation the moral sufferings is seting by the ECHR, as a rule, in obedience to the bases of justice and its own precedent practice.

In a case Tregubenko v. Ukraine, ECHR unanimously acknowledged the violation by Ukraine of § 1 of item 6 of European Convention in the context of possibility of giving the protest by the judge of the Supreme Court on the court decision which already entered into legal force; this decision actually calls in question all the recent procedure of supervision and the functions of the Supreme Court of Ukraine, as a supervisory instance having a right to examine the local and apellation court decisions, entered into legal force.

The ECHR decision in a case Meryt v. Ukraine from 30th of March, 2004 became the first decision, in which the violation of reasonable term of consideration of criminal case is established in Ukraine. In the ECHR consideration in 2004 there were eleven Ukrainian cases about violation of reasonable terms of consideration of cases (as violation of the § 1 item 6 of the European Convention). In the November, 2004 ECHR accepted the decision on the case Naumenko v. Ukraine, where it indicated that consideration of case in the Ukrainian courts took place during 9 years. For example, in a case Konovalov v. Ukraine, the examination of claim of declarant by the courts of

different levels of the Donetsk region had begun in January, 1992 and was finished only in 2003.

The analysis of the ECHR's decisions in which the facts of violation of human rights in Ukraine were accepted, gives the objective grounds to assert that their absolute majority touches the violation of right on the reasonable terms, violation of rights of prisoners in the places of imprisonment, nonperformance of court decisions, etc.

ECHR mentioned that except the problems related to duration of judicial trial, there is the problem of absence the "effective tool of legal defense"in the Ukrainian legislation in sense of the item 13 of Convention, which would allow declarants to realize the right for consideration of their lawsuits "during a reasonable term". Presence of tools of legal defense at exceeding of reasonable terms of consideration in criminal cases was also analyzed in the case Meryt v. Ukraine, now the creation of such mechanism after the ECHR decision in this case is obligatory for Ukraine, but it is not yet realized by the state authorities. In addition, we will notice that Ukraine, ratifying European convention in 1997, undertook the obligations to assume a new Criminal Processual Code during a year, that is not done until now. The changes, approved in the body of actual CPC 1960 did not removed the problem of its accordance to the standards in area of right on a reasonable terms.

So, the imperfection of processual legislation is one of factors, influencing on a situation with a right on the reasonable terms in Ukraine, there. The article 156 of Ukrainian CPC determines that maintenance under guards during pre-court investigation must not last more than two months, however this act foresees the possibility of extension of this term to 18 months is in the same article. Actually this term is prolonged even more, due to tightening of court investigation and supplementary investigation of case. Ukrainian legislator does not determine concretely, during what terms a person can be in a state of legal vagueness in connection with the court process on his case, nevertheless it set the concrete terms of duration for the separate stages of criminal process and their procedure.

Let us make a few examples of inactivity of Ukrainian courts. There was a case on the Mr. P. accusation on the articles 87 (Plunder) and 166 of Ukrainian Criminal Code, it was investigated in the local court from the 17th May of 2000 and to 30th December of 2003, - 3 years and 7 months, and it lied in a court without the changes. Mr. T. was arrested on 14th July of 2000 for the commission of the crime foreseen by articles 140 (Theft) and 193 of Ukrainian Criminal Code, his common term of staying under a guard before the decision on his case attained 3 years and 2 months; Mrs G. was arrested on the 6th September of 1999 accused in crimes, foreseen by articles 69 (Gangsterism) and 142 (Robbery) of Ukrainian Criminal Code, and his common term of staying under a guard before the court investigation attained 5 years. One the principal reasons of procrastination of judicial cases is the excessive work-load of Ukrainian courts, in particular, at the end of 2004 there were not considered in prosessual terms about 30 thousand cases only in the Supreme Court of Ukraine. Such work-load has the objective reasons: as if in 1992 the courts of Ukraine considered a little more half a million cases, now their quantity examined over six million for a year.

The quality of pre-court investigation gets worse, so as in 2005 in connection with unhigh-quality of the pre-court investigation almost every twelfth case was returned by

court to the supplementary examination, and also to the public prosecutor. In the same time the institute of supplementary investigation of cases not only limits a right on the reasonable terms but also conflicts with principles of presumption of innocence and of equality of parties in a court. Returning of plenary powers of common supervision to the office of public prosecutors, happened during the constitutional reform of 2004 also violates the right of person on a just and quick process, and conflicts with the item 6 of the European Convention.

The institute of supplementary investigation (that is the repeated investigation of criminal cases by the organs of pre-court investigation, in which the guilt of a defendant is not proved by a court) is not traditional for Ukrainian law. The item 13 of Regulation of the criminal legal proceeding of the Russian empire 1864, strongly forbade „to stop the decision of case in court under pretence of incompleteness, vagueness or contradiction of laws", such stop was looked, as illegal inactivity of power. First soviet Criminal processual Code of 1923 also did not contain the institute of returning the case on additional investigation, it appeared only in CPC of 1927 in Stalin's period and in future it was developed under influencing of totalitarian doctrines about the place and value of court as not the organ of justice, but as the organ of fight against criminality. We must specify, that there is no such processual institute as supplementary investigation not only the countries of EU but also in most republics of former USSR (in particular Moldavia, Russia).

It is possible to select other features of the modern Ukrainian Processual Law and Code projects, which do not promote the realization of right on the reasonable terms of consideration: they are the presence of great number of processual stages, the large influencing of the writing certificates made the organs of preliminary investigation, absence of continuity of a court process. Such approach cans and legalizes practice, which was folded on principles and traditions conflicting with the modern place of criminal procedure in the society, Ukrainian processual legislation now follows the principles inherent more to the totalitarian device of state.

We think that the mechanism of providing the right on reasonable terms must contain two elements:

- bringing the changes to the processual codes;
- development of the special normative acts.

In particular, in criminal procedure it is necessary absolutely to reduce the institute of supplementary investigation; to provide the presumption of person's innocence during realization of investigation and application of preventive measures; to provide the principle of „poisoned tree" which foresees losing legal force of proofs not only if they are receipted with violations of legality, but also for those proofs which are got, even legally, in stead of existence of illegal proofs.

A separate law must regulate the concepts of violation of right on the reasonable terms, point the categories of subjects which are the transmitters of such right, mechanisms of prevention and removals, establish organs, setting its violation, and the responsibility for the public servants who violate this right.

Violation of any right, in particular, the rights on the reasonable terms, can be halted by such measures:

- renewal of such right and removal of circumstances, causing its violation;

- moral or (and) material indemnification to the victim from violation of this right

We will specify, that violation of this right takes place exceptionally because of actions, inaction or decisions of the authorized state organ or its employees – which have the special legal status and competence in making decisions in criminal, civil, economic, administrative cases. These organs are courts, and employees are judges. At the same time on the stages of pre-court investigation and executive procedure these subjects are the organs of inquest, investigator, chief of investigation department, public prosecutor, state executor.

Therefore for the removal of circumstances, violating a right on the terms of consideration, the authorized organ must have a right to cancel the decisions of investigator, public prosecutor, court and state executor and to give them pointing obligatory for execution.

A question about the subject authorized to cancel these decisions or give the proper pointing is enough difficult. There exists two possible variants of its decision in Ukraine. First one is the appellate instance of court, which violates a right on a reasonable terms, can be this subject, separately for criminal, civil, economic and administrative processes. From other party, exactly administrative courts must take looking about violation of human rights because of illegal actions, inactivity or decisions of state organs and their public servants. On the face of it logically would be to pass production in matters about violation of right on a reasonable term exactly in administrative justice, that would simplify procedure and would remove the additional loading from the courts of general jurisdiction. At the same time the practice of the administrative legal proceeding is yet not very rich in Ukraine, and common courts and organs of pre-court investigation do not give lawsuits about violations of rights of person to administrative courts.

The objective reason of this phenomenon is the formal impossibility of such consideration, as it actually violates principle of independence of court, organs of preliminary investigation etc. This violation will take place, if an administrative court, acknowledging the restriction of right on a reasonable term, will give to the court of common jurisdiction or to the economic court pointing about accomplishing of certain judicial actions, which would be obligatory for execution. At the same time it is impossible to recover a right on a reasonable term in nature without such pointing.

For the removal of this contradiction we suggest to create two separate mechanisms – compensative and renewal. The compensative mechanism consists of adoption the fact of violation of right on the reasonable terms, awarding to the victim person the material indemnification. This mechanism must be realized in the framework of the administrative legal proceeding, but administrative court can not make decision, in the so-called basic cases which remains in production of court of common jurisdiction. Here lasts actual impossibility of bringing in to property accountability concrete judge or court violated a right on a reasonable term (for this reason compensative funds must be foreseen in a state budget), also ways of moral indemnification is a problem. So, the fact of confession of violation of right sometimes is sufficient satisfaction for a victim person, at the same time in practice it is heavy to get the official apology from the organs of power.

At the same time it is enough difficult to solve problem of consideration of cases about violation of rights on the reasonable terms by administrative courts. The size of material indemnification for victim must be set by a court not only taking into account the facts in a case but also the precedent practice of ECHR.

The renewal mechanism must consist of confession by the appellate instance the fact of violation of right on the reasonable terms and of giving to the court, where is basic case, obligatory pointing for implementation for the removal of violations and renewal of right. It may be done by acceptance, changes or cancels of judicial decisions, in business is. Thus a person must have right to choose any of these mechanisms of defence of his right (or both mechanisms at once). The decision of administrative court about the fact of violation of right on the reasonable terms must be held by court within the framework of renewal process and vice versa, at the same time the refusal in confession of violation of right within the framework of one mechanism is not the obstacle for the using of other.

We think, that violation of right on the reasonable terms because of actions, inactivity or decisions of organs of pre-court investigation, of public prosecutor and government executive service also must be appealed with the use of both mechanisms, depending on that in what process was excited the indicated right. We will specify, that in the context of providing of right on the reasonable terms it is very important to pass changes to the such laws of Ukraine „On status of judges", "On government executive service", „On the office of public prosecutor" etc.

Thank you